

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comcast Corporation)	CSR-7012-Z
)	
Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules)	
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 2007

Released: January 10, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. Comcast Corporation ("Comcast") has filed with the Chief of the Media Bureau the above-captioned waiver request (the "Waiver Request"), seeking a permanent waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules. For the reasons stated below, we deny Comcast's waiver request, but grant Comcast leave to amend its request.

II. BACKGROUND

A. Section 629 of the Act

2. Section 629(a) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to:

adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.¹

Through Section 629, Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor

¹ 47 U.S.C. § 549(a).

(“MVPD”).² Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”³ At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”⁴ Similarly, Congress also sought to avoid Commission actions “which could have the effect of freezing or chilling the development of new technologies and services.”⁵ Under Section 629(c), therefore, the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services.⁶

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000 a security element separate from the basic navigation device (the “host device”).⁷ The separation of the security element from the host device required by this rule (referred to as the “integration ban”) was designed to enable unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. MVPDs were permitted to continue providing equipment with integrated security until January 1, 2005, so long as modular security components, known as point-of-deployment modules (“PODs”),⁸ were also made available for use with host devices obtained through retail outlets. In April 2003, in response to a request from cable operators, the Commission extended the effective date of the integration ban until July 1, 2006.⁹ Then, in 2005, again at the urging of cable operators,¹⁰ the Commission further extended that date until July 1, 2007.¹¹ In that decision, the Commission also stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”¹²

B. The Waiver Request

4. On April 19, 2006, Comcast filed a request for a permanent waiver exempting four set-top box models developed by three different manufacturers (the “Subject Boxes”) from the integration ban. Those set-top boxes are:

Motorola DCT-700. The DCT-700 is used today in Comcast systems that utilize Motorola conditional access technology. According to Comcast, the DCT-700’s features include an electronic programming

² See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004) (“*BellSouth Waiver Order*”).

³ H.R. REP. NO. 104-204, at 112 (1995).

⁴ *Id.*

⁵ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

⁶ 47 U.S.C. § 549(c).

⁷ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998) (“*First Report and Order*”); 47 C.F.R. § 76.1204(a)(1).

⁸ For marketing purposes, PODs are referred to as “CableCARDS.”

⁹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) (“*Extension Order*”).

¹⁰ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) (“*2005 Deferral Order*”), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

¹¹ *Id.* at 6814, ¶ 31.

¹² *Id.*

guide (“EPG”), video-on-demand (“VOD”), pay-per-view (“PPV”) services, and other interactive television (“ITV”) capabilities.¹³ Comcast asserts that the Motorola DCT-700 cannot be used to output HD signals, store recorded programs, tune multiple channels simultaneously, or access the Internet.¹⁴

Scientific-Atlanta Explorer-940. The Explorer-940, which is currently in development, will be utilized in Comcast systems that employ Scientific-Atlanta’s conditional access technology. Comcast states that, like the DCT-700, the Explorer-940 will support EPG, PPV, VOD, and ITV capabilities.¹⁵ Comcast states that the Explorer-940 also cannot output HD signals, store recorded programs, tune multiple channels simultaneously, or access the Internet.¹⁶ The Explorer-940 has the capability to be used as a “client” device (but not a “server” device) in a home network with other Scientific-Atlanta boxes.¹⁷

Pace Chicago. The Pace Chicago set-top boxes can be deployed in systems utilizing either Motorola (the DC-505D) or Scientific-Atlanta (the DC-501P) conditional access technology.¹⁸ Comcast states these boxes can support parental controls, family tiers, and VOD.¹⁹ Comcast also notes that the boxes include DSG signaling capability and an optional USB port that could be used for home-networking purposes.²⁰ The Pace Chicago boxes cannot output HD signals, store recorded programs, tune multiple channels simultaneously, or access the Internet.²¹

In addition to requesting a waiver for these specific models, Comcast also requests a waiver for “digital set-top boxes that share the same characteristics” as the Subject Boxes.²² Further, Comcast requests that the waiver cover “replacement versions of these devices” and “accommodate the natural evolution of these set-top boxes to include new features and functions.”²³

5. Comcast argues that waiver of the navigation device rules would facilitate the deployment of new or improved cable services.²⁴ Comcast asserts that grant of a waiver will enable more consumers to receive digital picture quality and to access newly developed family tiers, parental controls, digital broadcast programming, and VOD programming by expanding the number of Comcast households that will have access to digital set-top boxes. Comcast also argues that the Waiver Request is consistent

¹³ Waiver Request at 4. In addition, the DCT-700 supports closed captioning, parental controls, Macrovision copy protection, and emergency alert messages. *Id.*

¹⁴ *Id.* at 4-5. The DCT-700 does not include an analog tuner. *Id.* at 5.

¹⁵ *Id.* at 5. In addition, the Explorer-940 also supports closed captioning, parental controls, Macrovision copy protection, and emergency alert messages. *Id.*

¹⁶ *Id.* at 5-6. The Explorer-940 also does not include an analog tuner. *Id.* at 6.

¹⁷ *Id.* at 6 n.15.

¹⁸ *Id.* at 6-7.

¹⁹ *Id.* at 6.

²⁰ See *Id.* at 6 n.17 (stating that “as home-networking technology develops, the USB port might be used at some future time to facilitate the networking of audio and video content within the home”); see also Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 24, 2006) (“*Comcast July 24 ex parte*”) (stating that “there are *no* current planned uses for the USB port” but acknowledging that it could be “used at some future point to support the networking of video and audio content within the home”).

²¹ Waiver Request at 6. The Pace Chicago set-top boxes also do not include an analog tuner. *Id.*

²² *Id.* at 7.

²³ *Id.*

²⁴ *Id.* at 3.

with Commission statements in the *2005 Deferral Order* and before the D.C. Circuit as to how low-cost, limited-capability boxes should be treated under the integration ban.²⁵ Comcast states that all of the devices are low-cost because they are expected to cost \$100 or less, compared to full-function set-top boxes that cost several hundred dollars each. According to Comcast, all of the devices also are limited-capability devices because they do not support output of HD signals, they cannot function as personal video recorders (“PVRs”), they are not designed for broadband Internet access, and they do not enable tuning of multiple channels.

6. Comcast argues that grant of a waiver is in the public interest for several reasons. First, Comcast asserts that approval of the Waiver Request will provide a cost-effective solution for delivering digital services²⁶ to analog televisions in households that lack digital set-top boxes, and to secondary analog televisions in households that already receive digital service. Comcast’s second public interest rationale is that grant of the Waiver Request will have no adverse effects on consumer electronics (“CE”) manufacturers or retailers.²⁷ Comcast argues that all of its cable systems already support CableCARD equipment and that grant of a waiver will have no effect on such support because its high-end boxes will be subject to the integration ban. Comcast further argues that CE manufacturers are focusing on higher-end retail devices and have demonstrated no interest in producing set-top boxes without DVR capability for retail.²⁸ The third public interest rationale Comcast offers is that denial of the Waiver Request would slow Comcast’s and other cable operators’ transition to an all-digital platform, thereby delaying their plans to reclaim analog spectrum for HD and VOD. Comcast argues that denial of the Waiver Request would force the operators to abandon plans to deploy these and similar boxes, or at least require operators to redesign the boxes at great expense, and that those costs would be passed along to consumers.²⁹

7. Comcast also contends that grant of the Waiver Request under Section 629(c) would be consistent with Commission precedent. In support of this claim, Comcast cites the *BellSouth Waiver Order*, in which we considered BellSouth’s request for a waiver pursuant to Section 629(c) of Section 76.640 of the Commission’s rules.³⁰ Section 76.640 requires cable operators to “support unidirectional digital cable products by providing to subscribers [CableCARDs] and related services that meet certain technical specifications.”³¹ Comcast contends that the relief granted in the *BellSouth Waiver Order* is indistinguishable from the relief Comcast seeks in its instant request.³²

²⁵ *Id.* at 8-9 (citing *2005 Deferral Order*, 20 FCC Rcd at 6813-14, ¶ 37; Brief for Respondents at 14, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006) (No. 05-1237)).

²⁶ Comcast suggests that these digital services could include music channels, specialty tiers (including family tiers), parental controls, and—depending on the level of service—pay-per-view, VOD, and certain limited interactive applications. *Id.* at 10-14.

²⁷ *Id.* at 14-17.

²⁸ Reply at 10-13.

²⁹ Waiver Request at 17-19, Reply at 16-18.

³⁰ Comcast also contends that we have “approved permanent waivers for cable set-top box equipment where, as here, compliance with the relevant rules would impose substantive costs on consumers and operators alike.” Waiver Request at 20 (citing *Pace Micro Technology PLC*, 19 FCC Rcd 1945 (2004); *GCI Cable, Inc.*, 15 FCC Rcd 10843 (2000); *General Cable of Fairfax County, Inc.*, 14 FCC Rcd 9568 (1999)).

³¹ *BellSouth Waiver Order*, 19 FCC Rcd at 15607, ¶ 1.

³² Waiver Request at 19-20, Reply at 22-23.

C. Comments

8. The Waiver Request was placed on public notice for comment on May 17, 2006.³³ Fourteen parties filed comments in response to the Waiver Request. Of the fourteen, eight filed in support of granting the waiver,³⁴ five submitted comments opposing the request,³⁵ and one filed in support of a limited waiver.³⁶

9. PC manufacturers and the CE industry argue that grant of a waiver will unfairly advantage cable providers in the set-top box market and run afoul of the purpose of Section 629. Sony and the IT Commenters argue that grant of a waiver would allow cable operators to retain a substantial portion of the navigation devices market in the coming decade, and that it would take many years for the number of separated-security devices to equal the number of integrated devices available in the market.³⁷ Sony contends that there cannot be an equitable level of competition until competitive devices are in a substantial number of homes, and that such a level will be difficult to attain if waiver is granted.³⁸ The Consumer Electronics Association (“CEA”) points out that despite evidence that prices for CableCARD products should have already decreased dramatically, and that the reliability of such products should have increased, neither has happened.³⁹ Thus, CEA argues, if the waiver were granted, economies of scale would continue to be elusive and costs for cable-ready products would remain high, which would defeat the purpose of Section 629.

10. In reply, Comcast cites the Commission’s statement in the *2005 Deferral Order* that waivers for low-capability set-top boxes would not “endanger the development of the competitive marketplace envisioned in Section 629.”⁴⁰ According to Comcast, CE manufacturers have not shown an interest in developing limited-capability boxes because consumers who would use a CableCARD-compatible device desire higher capability products.⁴¹ Thus, Comcast argues, the limited-capability devices for which it seeks waiver would not directly compete with the type of boxes the CE

³³ *Request for Waiver of 47 C.F.R. § 76.1204(a)(1) Filed with the Commission* (MB rel. May 17, 2006) (Public Notice).

³⁴ American Cable Association, Motorola, Inc., National Cable & Telecommunications Association, Pace Micro Technology PLC, Panasonic Corporation, RCN Corporation, Scientific Atlanta, and Thomson filed comments in support of the Waiver Request.

³⁵ Consumer Electronics Association (“CEA”); The IT Commenters (which consists of Hewlett Packard Company, Intel Corporation, and Sony Electronics Inc.); Chris Llana; Sharp Electronics; and Sony Electronics (filing separately from the IT Commenters) filed comments in opposition of the waiver.

³⁶ Microsoft Inc. filed comments in support of a limited waiver.

³⁷ IT Comments at 8; Sony Comments at 4. *See also* Microsoft Comments at 5 (stating that Comcast will deploy the limited-capability set-top boxes in 20 percent of its customers’ homes by the end of 2006).

³⁸ Sony Comments at 4.

³⁹ *Id.* (citing CEA Comments at 3-4, CS Docket No. 97-80 (Feb. 19, 2004)); CEA Reply at 4, CS Docket No. 97-80 (Mar. 10, 2004). *See also* Waiver Request at 17 (“When these design and development costs are then added to the cost of a CableCARD, the overall cost of each device would increase greatly – on the order of 50 percent or more.”); Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission attaching Michael L. Katz, *An Economic Analysis of the Comcast Set-Top Box Waiver Request* at 10 (Aug. 1, 2006) (“*Katz Analysis*”) (relaying Verizon projections that CableCARDs cost \$50 to \$70 per card); Sony Comments at 7 (stating that, “to the best of [Sony’s] knowledge, the cost of the CableCARD itself is roughly \$80”).

⁴⁰ Comcast Reply at 11 (citing *2005 Deferral Order*, 20 FCC Rcd. at 6813).

⁴¹ *See id.* at 11 (stating that manufacturers have shown little interest in building low-cost set-top boxes and have never asked for specifications or licenses for these products).

manufacturers wish to develop, and granting a waiver for such devices would not inhibit the growth of the retail cable-ready device market.⁴² Pioneer North America asserts, however, that it would market low-cost devices if it could offer them with two-way capabilities.⁴³ Sony also contends that it “wants to serve all segments of the cable compatible device market, including the low-cost, low capability segment.”⁴⁴ Sony asserts that it “cannot offer an equivalent device for sale at retail,”⁴⁵ however, because CE manufacturers cannot develop boxes with the two-way functionality that the Subject Boxes employ.⁴⁶ CEA notes a similar disconnect: the Subject Boxes do not implement the OpenCable Application Platform (“OCAP”), whereas any unaffiliated manufacturer that wants to incorporate two-way capabilities into a device must sign the OCAP agreement and must implement OCAP middleware.⁴⁷ Therefore, CEA reasons, Comcast would not allow the Subject Boxes to be attached to their cable systems if the Subject Boxes were offered at retail by an unaffiliated manufacturer.⁴⁸

11. Accordingly, Sony argues that we should not grant any “low-cost, limited capability” waivers if the subject devices have capabilities that an unaffiliated manufacturer cannot offer at retail.⁴⁹ Chris Llana, a consumer, agrees with Sony’s contention, and argues that that grant of low-cost, limited-capability waivers should be limited to boxes that perform “basic, *simple*, digital-to-analog conversion.”⁵⁰ Comcast responds that limiting the availability of waivers for low-cost, limited-capability boxes to those without two-way capability “would be a dead letter,” as such boxes do not exist, and even if they did, they would deprive consumers of digital services such as VOD and EPGs.⁵¹

12. Commenters that oppose grant of the Waiver Request also argue that grant of a waiver would thwart common reliance.⁵² The IT Commenters contend that grant of the Waiver Request would

⁴² *Id.* at 12 (stating that Comcast has attempted to reach agreements with retailers to sell integrated set-top boxes to no avail).

⁴³ Letter from Adam Goldberg, Vice President, Government and Industry Affairs, Pioneer North America, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 (Aug. 24, 2006) (“I also explained that Pioneer may very well consider marketing devices with similar capability to Comcast’s ‘low-cost, limited-capability integrated boxes’ (which *include* PPV, VOD and EPG features), if it were only possible under the Commission’s current Rules, contrary to assumptions made in other filings.” (citing *Katz Analysis* at 6)).

⁴⁴ Letter from Jim Morgan, Director and Counsel, Government and Industry Affairs, Sony Electronics, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 (Aug. 11, 2006).

⁴⁵ Letter from Jim Morgan, Director and Counsel, Government and Industry Affairs, Sony Electronics, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 7 (Aug. 4, 2006) (“*Sony Aug. 4 ex parte*”).

⁴⁶ *See id.* at 8 (“No license exists today that would allow manufacture and sale of devices that could compete directly with the DCT-700, Explorer-940, and Pace Chicago, and Sony Electronics is not aware of any plan by CableLabs or any cable provider to offer such a license.”).

⁴⁷ CEA Comments at 13. *See also Sony Aug. 4 ex parte* at 7.

⁴⁸ CEA Comments at 13.

⁴⁹ *Sony Aug. 4 ex parte* at 7.

⁵⁰ Chris Llana Comments at 1 (italics in original).

⁵¹ Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission at 6 (Aug. 9, 2006).

⁵² *See 2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30 (defining “common reliance” as “cable operator reliance on the same security technology and conditional access interface that consumer electronics manufacturers must rely on” and concluding that common reliance will “align MVPDs’ incentives with those of other industry participants so that MVPDs will plan the development of their services and technical standards to incorporate devices that can be independently manufactured, sold, and improved upon” and make it “far more likely that [MVPDs] will continue to support and take into account the need to support services that will work with independently supplied and purchased equipment”).

provide no incentive for Comcast to put sufficient resources toward technology that would level the playing field between leased boxes and competitive consumer electronics navigation devices available at retail.⁵³ Additionally, the IT Commenters argue that until the cable industry has to work from the same set of standards as CE manufacturers, commercially available devices that are truly competitive with leased devices will not be attainable.⁵⁴ Sharp Electronics (“Sharp”) contends that cable operator support for CableCARD devices has been “spotty and fraught with pitfalls,”⁵⁵ and that these problems could have been avoided if the cable providers relied on the same removable security that CE manufacturers are forced to rely upon. Sharp further argues that, without common reliance, cable providers will have no incentive to provide customer service to CableCARD products. In reply, Comcast argues that even with a waiver, it would still be subject to common reliance for higher-end set-top boxes.⁵⁶ Comcast further argues that because it is now leasing CableCARD-ready boxes, it will not only be fully supportive of all cable-ready products, but will be required to provide such support to its own set-top box customers, which will assure common reliance.⁵⁷

13. Although generally supportive of the argument that grant of a waiver will facilitate the DTV transition, Microsoft argues that allowing the waiver to cover subsequent models would frustrate the goals of Section 629.⁵⁸ Microsoft points out that the statute and the Commission’s rules require that waivers be only “for a limited time” and must be “necessary to assist the development or introduction of a new or improved multichannel video program or service.”⁵⁹ While Microsoft believes that grant of the Waiver Request would assist the DTV transition, it argues that allowing the waiver to cover the “natural evolution” of the devices would create a gap in the market that would “render the ban moot.”⁶⁰ Microsoft suggests that we grant Comcast’s waiver for the Subject Boxes but require separate waiver requests for all subsequent devices.⁶¹ Microsoft contends this is the best way to ensure consumer choice, keep cable providers’ costs down, and to rapidly develop downloadable security.⁶² In reply, Comcast asserts that grant of the waiver without limitation would increase the reliability and decrease the price of set-top boxes. Moreover, Comcast states that its request only extends to the natural evolution of the specific boxes for which it seeks waiver and does not include any boxes that will have “DVR, HD, multiple

⁵³ IT Comments at 8.

⁵⁴ *Id.* at 6 (“Creating a competitive market for navigation devices that actually will serve consumers’ needs and desires requires ‘common reliance’ standards for security, technology and conditional access interfaces.”).

⁵⁵ Sharp Comments at 2. *See also* Sony Comments at 3 (arguing that there are substantial incompatibilities that exist between the CableCARD devices and the networks they are attached to) (citing Letter from Julie M. Kearney, Senior Director and Regulatory Counsel, Consumer Electronics Association (Mar. 23, 3006) (discussing the incompatibilities experienced by CE manufacturers)).

⁵⁶ Comcast notes that it already deploys higher-end set-top boxes in every digital system it operates, and that the integration ban will apply to those boxes. Comcast Reply at 14.

⁵⁷ *Id.* at 15. Comcast has signed agreements with Panasonic and Samsung for those vendors to provide CableCARD-ready set-top boxes for use on Comcast’s cable systems.

⁵⁸ *See* Microsoft Comments at 7 (arguing that the boxes for which Comcast seeks a waiver are inherently two-way communication devices, and that the only natural evolution of these boxes would be to include such features as HDTV and PVR capabilities).

⁵⁹ *Id.* at 4 (citing 47 U.S.C. § 549(c)).

⁶⁰ *Id.* at 8-9 (stating that the waiver will cover set-top boxes that will be deployed in 20 percent of Comcast’s digital subscribers’ homes by the end of 2006, and without limits, the waiver could create a “potentially unlimited ceiling.”).

⁶¹ *Id.* at 10.

⁶² *Id.*

tuning, or broadband Internet access,”⁶³ and claims that it is not seeking a waiver for any box that has advanced capabilities.⁶⁴

III. DISCUSSION

14. Comcast makes its request for waiver “[p]ursuant to Sections 1.3, 76.7 and 76.1207 of the Commission’s rules and Section 629(c) of the Communications Act.”⁶⁵ Accordingly, we analyze its request pursuant to the waiver standards set forth in Section 629(c)⁶⁶ and the Commission’s *2005 Deferral Order*, as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission’s rules. As discussed below, we find that the request does not justify the grant of a waiver under any of these standards. We therefore deny Comcast’s request.

A. Section 629(c) of the Act

15. Comcast argues that its request for waiver satisfies the “special waiver provision in Section 629(c) of the Act and 76.1207 of the Commission’s rules.”⁶⁷ Section 629(c) states in relevant part that

[t]he Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.⁶⁸

As mentioned above, the principal goal of Section 629 of the Act is to foster competition and consumer choice in the market for navigation devices. Section 629(a) thus charges the Commission with adopting regulations that further that goal. At the same time, however, Congress intended “that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”⁶⁹ Accordingly, waivers of those regulations are granted when doing so “is necessary to assist the development or introduction of a new or improved” service, such as, for example, a nascent MVPD offering from a new competitor.⁷⁰

16. As described in detail above, Comcast argues that grant of the Waiver Request “will afford millions more Comcast customers access to a wide array of digital programming and services and in more locations in the home.”⁷¹ Specifically, it claims that a waiver of the integration ban for the

⁶³ Comcast Reply at 4.

⁶⁴ Waiver Request at 5 (asserting that successor set-top boxes subject to the waiver would not include such capabilities as HDTV, PVR, broadband Internet access, or multiple tuning).

⁶⁵ *Id.* at 1 (citing 47 C.F.R. §§ 1.3, 76.7(i), and 76.1207; 47 U.S.C. § 549(c)).

⁶⁶ Section 76.1207 of the Commission’s rules, 47 C.F.R. § 76.1207, implements Section 629(c) of the Act and tracks the language of that statutory provision almost verbatim.

⁶⁷ Waiver Request at 3.

⁶⁸ 47 U.S.C. § 549(c). Section 76.1207 of the Commission’s rules implements Section 629(c) of the Act and tracks the text of the statute nearly verbatim. 47 C.F.R. § 76.1207.

⁶⁹ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

⁷⁰ See *First Report and Order*, 13 FCC Rcd at 14801, ¶ 65 (declining to apply the integration ban to DBS providers and noting that “in many instances, the Commission refrains from imposing regulations on new entrants”) (citation omitted).

⁷¹ Waiver Request at 10.

Subject Boxes would expand access to its digital basic service, which includes hundreds of broadcast and non-broadcast programming services; music audio channels; special tiers of service, including the announced Family Tier;⁷² digital parental control technologies;⁷³ EPGs; PPV programming; VOD; and certain limited ITV applications.⁷⁴ In addition, Comcast asserts that a waiver would accelerate the transition to digital television.⁷⁵

17. As a general matter, we do not find compelling Comcast's argument that grant of the Waiver Request is necessary to assist the development or introduction of the majority of these services. First, we note that Comcast reported in February of 2006 that all of its subscribers live in markets where it has launched digital cable service.⁷⁶ As a result, the digital services Comcast describes today are already offered to its entire customer base. Thus, the waiver could hardly be "necessary" for the "introduction" of these services as they already exist.

18. Second, as Comcast points out in its Waiver Request, 45.6 percent of its subscribers already are digital cable subscribers.⁷⁷ Thus, a significant portion of Comcast's subscribers already receive many of the services described in the Waiver Request. Further, it appears that a number of those services have achieved success in the marketplace. According to a July 2006 Comcast press release, revenues from VOD and PPV "increased 30% in the second quarter of 2006 from the same time in 2005."⁷⁸ We conclude, therefore, that Comcast already has the incentive to expand the availability of many of these services to a greater portion of its subscriber base. Indeed, we note that while Comcast claims that failure to obtain a waiver would "slow[]" its migration to an all-digital network,⁷⁹ it does not claim that it would not achieve that goal absent a waiver. Moreover, we note that Comcast itself has stated that the migration to all-digital networks will be gradual,⁸⁰ and that it likely will be "another

⁷² *Id.* at 11 (stating that the Family Tier, "with an average of 35-40 channels, including such family-friendly programming networks as PBS Kids Sprout, Disney Channel, Toon Disney, Nickelodeon, and Discovery Kids ... will soon be available across most of Comcast's 'footprint'").

⁷³ *Id.* at 11-12.

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 12-14.

⁷⁶ See Comcast Corporation, 2005 Annual Report on Form 10-K, Securities and Exchange Commission at 3 (filed Feb. 22, 2006).

⁷⁷ Waiver Request at 10.

⁷⁸ See Press Release, Comcast Corporation, *Comcast Reports Second Quarter 2006 Results* (July 27, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=888265>; see also Press Release, Comcast Corporation, *Comcast Reports First Quarter 2006 Results* (April 27, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=848479> ("Driven by ON DEMAND movie and event purchases, pay-per-view revenues increased 29% from the first quarter of 2005. Pay-per-view revenue has shown strong growth with the rollout of ON DEMAND, increasing more than 20% on average over the past two years."). See also National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. § 76.1204(a)(1) at 14 n.41 (filed Aug. 16, 2006) ("*NCTA Request for Waiver*") (noting that "VOD has been enormously popular with digital cable customers" and reporting that "Comcast delivered about 127 million VOD streams in February 2006, up from 87 million a year earlier" (citing George Winslow, *VOD Scorecard*, MULTICHANNEL NEWS, May 1, 2006)).

⁷⁹ Waiver Request at 18.

⁸⁰ See *Stick with the Game Plan*, CABLEFAX DAILY, March 3, 2005 (reporting that Comcast Chief Financial Officer John Alchin predicts that "analog service is going to be around for quite some time").

decade” before it makes the switch to all-digital networks.⁸¹

19. Accordingly, we do not find that a waiver here is “necessary” to assist in the development or introduction of new or improved services. To the contrary, we believe that, under the circumstances, grant of Comcast’s Waiver Request under Section 629(c) effectively would nullify the goal of Section 629(a). The purpose of Section 629(c) is to allow for waivers where *necessary* to assist the development or introduction of new or improved services that otherwise would be prohibited. And while it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).

20. In addition, we note that Comcast failed to request a waiver “for a limited time,” as required by Section 629(c).⁸² This limit helps to ensure that the Commission progresses toward furthering the goal of a competitive market for navigation devices. Thus, on its very face, Comcast’s waiver request fails to meet the requirements envisioned by Congress.

21. We also disagree with Comcast’s argument that grant of its Waiver Request would be consistent with Commission precedent. The replacement of all existing boxes would be an extraordinary burden. In contrast, Comcast has no requirement to replace any of its existing boxes.

22. In the *BellSouth Waiver Order*, BellSouth had requested a waiver because fundamental differences between the digital cable system standard it employed and the technical standard adopted by the Commission rendered BellSouth’s system incompatible with the Commission’s plug-and-play requirements. In that decision, we noted that the unidirectional CableCARD support requirements posed a “virtually insurmountable burden and expense” for a cable operator that, at the time, had only 40,000 subscribers,⁸³ and that compliance would have required BellSouth to purchase two new cable headends and 65,000 set-top boxes and make more than 35,000 visits to subscriber homes.⁸⁴ We determined that granting the waiver requested by BellSouth was appropriate because, in the absence of a waiver, Section 76.640(b) had the potential to “eliminat[e] a competitor from the MVPD marketplace” and because the waiver would affect “very few subscribers.”⁸⁵ Those circumstances are fully distinguishable from the instant case.⁸⁶

23. First, denial of BellSouth’s waiver request would have required it to replace existing

⁸¹ Michael Grebb, *Many Devices, No Boundaries, One Provider*, CABLE WORLD, April 17, 2006, available at http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=041706&file=manydevices.htm (quoting Comcast CTO David Fellows as saying that Comcast will “probably take off everything about the same time the must-carries go off the air – so in the 2009-ish time frame. But even there, we will leave a set of analog channels on – I’m just guessing for another five years or so. That’s so basic-only subscribers or third or fourth TVs in the home can tune a set of 20 or 30 channels. I think that’s in place for another decade”). See also Letter from Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation, to Honorable Kevin J. Martin, Chairman, Federal Communications Commission at 2 (Aug. 21, 2006).

⁸² 47 U.S.C. § 549(c).

⁸³ *BellSouth Waiver Order*, 19 FCC Rcd at 15609-10, ¶¶ 4-5. In contrast, today, Comcast has more than 24 million subscribers. See Comcast Corporate Overview, <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-homeprofile> (last visited Jan 9, 2007).

⁸⁴ *Id.* at 15609, ¶ 4.

⁸⁵ *Id.*

⁸⁶ See generally Sony Comments at 8-9 (noting the factual differences between the Waiver Request and those that justified grant of a waiver to BellSouth).

boxes, whereas Comcast is seeking a waiver for boxes that it would like to purchase in the future. In addition, while Comcast argues that imposition of the integration ban will “require materially more expensive devices,”⁸⁷ it does not assert that this will cause it to exit the MVPD marketplace. Moreover, nothing in the record suggests that this waiver would only affect 40,000 subscribers. To the contrary, Comcast points out that it “aims to purchase between 1 million and 1.5 million DCT-700s” in 2006 and “expects to purchase comparable numbers of these devices ... in subsequent years if the instant waiver is granted.”⁸⁸ Therefore, a waiver here would have a far greater impact on the development of a competitive market for navigation devices than did the *BellSouth Waiver Order*. Furthermore, in the *BellSouth Waiver Order*, Section 76.640(b) had potential harmful effects on consumers. Specifically, consumers would have had to face “disruptive residential visits and construction activity” and would have required “education regarding operation of new equipment” if the rule were imposed.⁸⁹ In contrast, consumers will not face such substantial harms if we do not grant a waiver in the instant case. The integration ban only applies to “new navigation devices for sale, lease, or use.”⁹⁰ Because this rule only applies to new devices put into service, compliance will not impose visits, construction, or education requirements upon consumers. For these reasons, Comcast’s reliance on the *BellSouth Waiver Order* is misplaced.⁹¹

B. The 2005 Deferral Order

24. Comcast next argues that the Waiver Request is consistent with the Commission’s 2005 *Deferral Order* regarding waivers of the integration ban for low-cost, limited-capability set-top boxes.⁹² Specifically, Comcast states that the Subject Boxes are low-cost because they are expected to cost \$100 or less, compared to full-function set-top boxes that cost several hundred dollars each.⁹³ According to

⁸⁷ Waiver Request at 17 (emphasis omitted).

⁸⁸ *Id.* at 10.

⁸⁹ *BellSouth Waiver Order*, 19 FCC Rcd at 15611, ¶¶ 6-7.

⁹⁰ 47 C.F.R. § 76.1204(a)(1).

⁹¹ We also disagree that our other decisions to grant waivers of the Commission’s cable equipment rules cited by Comcast support grant of the instant request. See Waiver Request at 20 (citing *Pace Micro Technology PLC*, 19 FCC Rcd 1945 (2004); *GCI Cable, Inc.*, 15 FCC Rcd 10843 (2000); *General Cable of Fairfax County, Inc.*, 14 FCC Rcd 9568 (1999)). First, we note that none of those waiver requests were made under Section 629(c) or our rules implementing that statutory provision. See 47 C.F.R. § 76.1207. Second, we conclude that, as is the case with the *BellSouth Waiver Order*, each of those decisions can be distinguished on the basis of the factual circumstances involved. See *Pace Micro Technology PLC*, 19 FCC Rcd at 1947, ¶ 8 (2004) (noting that the standard in Section 76.605(a)(2) of the Commission’s rules “was designed to protect signal quality and Pace has agreed to replace boxes when signal quality is degraded, [and therefore] a waiver will not conflict with the intent of our rule,” whereas “[a] blanket recall, on the other hand, would be burdensome to consumers and inordinately expensive for the manufacturer and its cable operator customers”); *GCI Cable, Inc.*, 15 FCC Rcd 10843 (2000) (concluding that allowing GCI to replace existing converters with compliant devices as the need arises, rather than requiring GCI to retire or retrofit all of the converter boxes immediately, would be in the best interest of GCI’s subscribers); *General Cable of Fairfax County, Inc.*, 14 FCC Rcd at 9570, ¶ 8 (1999) (concluding that “we do not believe that any reasonable purpose would be served by requiring the retirement or costly retrofitting of existing equipment).

⁹² Waiver Request at 3, 8-9; Reply at 2-3. In the 2005 *Deferral Order*, the Commission stated that it would “entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.” 20 FCC Rcd at 6814, ¶ 36. As explained herein, the waivers available under Sections 629(c) and the 2005 *Deferral* are distinct. We therefore wish to clarify and emphasize that future requests for waiver for low-cost, limited-capability set-top boxes will not be considered under Section 629(c), but rather under the standard developed in the 2005 *Deferral Order*. We remind parties that requests for limited-capability waivers must include “the full specifications for any device(s) for which waiver is sought.” *Id.* We also note that requests for waiver made pursuant to the 2005 *Deferral Order* are not subject to the 90-day time limit set forth in Section 629(c). 47 U.S.C. § 549(c).

⁹³ Waiver Request at 9; Reply at 17.

Comcast, the Subject Boxes also are limited-capability devices because they do not support output of HD signals, they cannot function as PVRs, they are not designed for broadband Internet access, and they do not enable simultaneous tuning of multiple channels.⁹⁴

25. As described above, however, the Subject Boxes do enable subscribers to access EPGs, PPV services, VOD and interactive television. In addition, it is our understanding that the Subject Boxes support the use of switched digital capabilities. Further, the boxes produced by two of the three manufacturers include home networking capabilities that permit the boxes to act as functional PVRs.⁹⁵ Finally, the Waiver Request is not limited to the Subject Boxes; Comcast also requests waiver for “the natural evolution of these set-top boxes [including] new features and functions.”⁹⁶

26. Accordingly, we conclude that the Subject Boxes do not meet the limited-capability standard announced in the *2005 Deferral Order*. The Commission never contemplated that “limited capability integrated digital cable boxes” would include devices with two-way functionality or the ability to act as functional PVRs. Rather, this category of boxes is confined to those devices whose functionality is limited to making digital cable signals available on analog sets.⁹⁷ In explaining why it would entertain requests for waiver of the integration ban, the Commission emphasized that “it is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition.”⁹⁸ In other words, the low-cost, limited-capability waiver standard that the Commission created in the *2005 Deferral Order* is, first and foremost, a narrow one.

27. Moreover, the Commission remained aware of the goal to develop a competitive marketplace for navigation devices. Accordingly, the Commission stated that waiver requests would not be warranted “for boxes that contain personal video recording (‘PVR’), high-definition, broadband Internet access, multiple tuner, or *other similar advanced capabilities*.”⁹⁹ This list of capabilities was not intended to be exhaustive, as demonstrated by the inclusion of the phrase “other similar advanced

⁹⁴ Waiver Request at 7.

⁹⁵ Comcast points out that that the Explorer-940 “has the capability to be used as a ‘client’ device (but not a ‘server’ device) in a home network with other Scientific-Atlanta set-top boxes.” Waiver Request at 6 n.15. We understand this to mean that if an Explorer-940 set-top box is used in a home network with a server device that includes PVR capabilities, then the Explorer-940 would be able to access the programming stored on that server device – thus serving as a functional PVR. Similarly, Comcast has stated that the Pace Chicago set-top boxes include an optional USB port that could be “used at some future time to facilitate the networking of audio and video content within the home. For example, video programming might be delivered from a (server) DVR-enabled set-top box in the living room to (client) Pace Chicago boxes in other rooms via the USB port.” *Id.* at 6 n.17.

⁹⁶ *Id.* at 7.

⁹⁷ See *Sony Aug. 4 ex parte* at 7 (arguing that any boxes that are granted a waiver should be limited in functionality). In fact, several years ago Pace Micro developed precisely this type of device. The “Digital Cable Adapter” was a unidirectional “set-back” device that would have decoded digital signals for use with analog televisions and VCRs without any advanced features. See Press Release, Pace Micro, *Pace Unveils the World’s First Digital Cable Adapter* (June 9, 2003). This device, which was exhibited at the 2003 NCTA National Show in Chicago, would have cost about \$69 – but ultimately was never mass produced due to a lack of interest from cable operators. See Jeff Baumgartner, *New MSO-backed JV Proposes Sub-\$100 Set-Top with Downloadable Security*, CED BROADBAND DIRECT, Dec. 22, 2003, available at <http://www.cedmagazine.com/toc-bbdirect/2006/20061222.html>.

⁹⁸ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37. Similarly, the Commission discussed how low-cost, limited-capability set-top boxes could facilitate the migration of cable systems to all digital networks. See *id.* Advanced capabilities are not necessary to accomplish that goal, either; all that is required is a set-top box that can make digital cable programming viewable on an analog television set.

⁹⁹ *Id.* (emphasis added).

capabilities.” Throughout the navigation device and plug and play negotiations, all parties have understood the term “advanced” to include two-way capability. Indeed, an entire section of the Memorandum of Understanding signed by major cable and consumer electronics manufacturers – which helped to shape the Commission’s understanding of the topic during the unidirectional plug-and-play rulemaking proceeding¹⁰⁰ – deals exclusively with defining two-way products as “advanced.”¹⁰¹

28. In addition, in other pleadings before the Commission, the cable industry has advocated that these two-way, interactive features be classified as “advanced” capabilities. Specifically, the cable industry recommended that the Commission include in its regulations a requirement that non-interactive consumer electronics equipment contain a warning that “Certain advanced and interactive digital cable services such as video-on-demand, a cable operator’s enhanced program guide and data-enhanced television services may require the use of a set-top box.”¹⁰² The Subject Boxes contain precisely these advanced functions, as well as PPV capabilities and home-networking features. In addition, the boxes produced by two of the three manufacturers can act as functional PVRs. Finally, we note CEA’s and Sony’s concern that, if an independent manufacturer produced and marketed these exact same boxes, Comcast would not allow them to be used in its system.

29. Moreover, in the *2005 Deferral Order*, the Commission set forth the circumstances in which it would consider waiving the integration ban for low-cost, limited capability boxes. Specifically, the Commission stated that, “as cable systems migrate to all-digital networks, we will also consider whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis.”¹⁰³ However, Comcast has not demonstrated that the waiver it seeks would have a direct and immediate impact on its migration to an all-digital network, despite the fact that the *2005 Deferral Order* clearly requires such a showing. Indeed, Comcast has acknowledged that: “Even if we roll out low-end boxes as fast as we can, it is likely to be sometime after 2010 before we can go all-digital.”¹⁰⁴

30. For the reasons stated above, we conclude that the Subject Boxes do not qualify as “low-cost, limited capability” devices under the *2005 Deferral Order* because they include two-way functionality that is not necessary to make digital cable programming viewable on analog television sets. Moreover, we find that Comcast has failed to demonstrate that the waiver will make any material difference in its “migration to an all-digital network.” Accordingly, we deny Comcast’s Waiver Request.¹⁰⁵ However, we wish to emphasize that we continue to believe that “[i]t is critical to the DTV

¹⁰⁰ See generally *Implementation of Section 304 of the Telecommunications Act of 1999: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 518 (2003) (seeking comment on the Memorandum of Understanding and the rules proposed therein).

¹⁰¹ Letter from Carl E. Vogel, President and Chief Executive Officer, Charter Communications, et al. to The Honorable Michael K. Powell, Chairman, Federal Communications Commission, *attaching* Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers at 10 (Dec. 19, 2002). The section includes a discussion of EPGs: “Cable operators’ EPG will be provided for advanced interactive digital cable products via OCAP or its successor technology.” *Id.* See also *id.* at 3, 4, 6-7 (terming two-way capable devices “Advanced Interactive (two-way) Digital Cable Products”).

¹⁰² NCTA Reply Comments, CS Docket No. 97-80, PP Docket No. 00-67 at Appendix 1, page 7 (filed April 28, 2003). See also NCTA Comments, CS Docket No. 97-80, PP Docket No. 00-67 at 5-6 (filed March 28, 2003); *NCTA Request for Waiver* at 14 (describing VOD and EPGs as “advanced services”).

¹⁰³ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

¹⁰⁴ Letter from Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation, to Honorable Kevin J. Martin, Chairman, Federal Communications Commission at 2 (Aug. 21, 2006).

¹⁰⁵ By limiting the scope of waivers available under the *2005 Deferral Order*, the Commission sought to ensure that cable operators could seek waiver for only the most basic set-top boxes, thereby encouraging CableCARD support, (continued....)

transition that consumers have access to”¹⁰⁶ such limited-capability set-top boxes, and therefore will entertain and grant future requests that satisfy the criteria set forth in the *2005 Deferral Order*.

C. Sections 1.3 and 76.7 of the Commission’s Rules

31. Comcast also submitted its Waiver Request under the general waiver provisions found in Sections 1.3¹⁰⁷ and 76.7¹⁰⁸ of the Commission’s rules. For the same reasons set forth in subsections A. and B. above, we conclude that Comcast is not eligible for a waiver of the integration ban under these provisions. Despite Comcast’s assertion that grant of the Waiver Request would further the digital transition and the deployment of digital services, we do not believe that this waiver will significantly further these public interest benefits. Moreover, we conclude that, to the extent that there are any public interest benefits that might result from a waiver, they would not outweigh the significant harm that would result from undermining the integration ban and impeding the development of a competitive market for navigation devices.¹⁰⁹

32. However, we do note that a limited waiver might be appropriate for set-top boxes used to permit subscribers to access specialty tiers, such as “family and ethnic tiers of programming,” that Comcast permits subscribers to purchase without first subscribing to any other tier of service besides the

(...continued from previous page)

deployment of multistream CableCARDs, a bidirectional agreement, and ultimately the development of a downloadable security function that would provide for common reliance by cable-provided devices as well as devices available at retail. *See 2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 36. Specifically, the Commission noted in the *2005 Deferral Order* that discussions regarding an agreement for two-way capabilities, such as EPGs, VOD, and PPV, were underway. *Id.* at 6812, ¶ 33. To date, however, no agreement has been reached to include such two-way capabilities in competitive navigation devices, and, as a consequence, this functionality is not available in devices produced under the Commission’s plug-and-play rules. *See* 47 C.F.R. § 15.123(a). Accordingly, we agree with those commenters that argue that allowing Comcast to include advanced, two-way capabilities in boxes that include integrated security (*i.e.*, that do not use a CableCARD) after the ban goes into effect would be detrimental to the achievement of the goal of Section 629. *See, e.g.*, IT Commenters Comments at 2 (arguing that grant of the Waiver Request would result “in less competition in a market that Congress intended to be open competitively at retail”); Sharp Comments at 2 (“In order for a market for competitive devices to exist, it must be possible for competitive devices to effectively compete with operator-leased devices.”); *Sony Aug. 4 ex parte* at 7 (“[G]rant of a waiver for devices like those described in the Waiver Request would harm competition in the market for navigation devices, and thereby undermine the statutory directive of Section 629.”); Microsoft Comments at 10-11 (“To uphold the objectives of Section 629 and promote consumer choice among navigation devices, the Commission also must ensure that it grants the waiver for such precisely defined devices on terms that enable other manufacturers to develop offerings for the same market served by the” Subject Boxes.). *See also Charter Communications, Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006) (concluding that “this court is bound to defer to the FCC’s predictive judgment that, ‘[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation’” and deferring to the Commission’s explanation that “[a]t the heart of a robust retail market for navigation devices is the reliance of cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must rely on in developing competitive navigation devices”) (citations omitted).

¹⁰⁶ *See 2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

¹⁰⁷ *See* 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”).

¹⁰⁸ *See* 47 C.F.R. § 76.7 (“On petition by any interested party, ... the Commission may waive any provision of this part 76,”).

¹⁰⁹ The benefits of the integration ban include the consumer savings and technological advances that will result from a competitive market as well as “the fact that Congress regarded the commercial availability of navigation devices from independent sources as a benefit in and of itself.” *Charter Communications, Inc. v. FCC*, No. 460 F.3d 31, 42 (D.C. Cir. 2006) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29). *See also* discussion *supra* note 109.

basic service tier.¹¹⁰ As we stated recently, specialty tiers such as family and ethnic tiers promote the public interest by allowing for more targeted programming, increasing the quality of available programming, and giving consumers greater control over the type of programming they see and the ability to limit the amount they spend on service.¹¹¹ Moreover, we note that, unlike digital cable services such as VOD and PPV – which, as noted above, already have proven themselves to be economically viable – a waiver may be necessary to promote new offerings catering to audiences interested in specialty tiers, such as those focusing on family and ethnic programming.¹¹² However, we caution that we do not anticipate granting waivers for set-top boxes to be used to access family and ethnic tiers or other offerings where the subscriber first must buy-through tiers (other than the basic tier). In order to demonstrate that a waiver is consistent with the public interest and does not unnecessarily undermine Section 629(a), cable operators must be able to demonstrate that they already have taken reasonable steps to make such offerings available to subscribers. A requirement to buy-through tiers beyond the basic tier in order to be eligible to receive a new or improved service would appear to be inconsistent with this requirement. We also note that such a waiver would not be a general waiver for that box and would not allow non-compliant boxes to be utilized by subscribers who do not subscribe to family or ethnic tiers. Rather, the availability of these boxes would be limited to such family and ethnic tier subscribers.

33. We do not further analyze whether this type of limited waiver would be appropriate here because Comcast has not provided us with a description of the procedures that it would implement to ensure that the set-top boxes which would be the subject of such a waiver are used only by subscribers who access the family and ethnic tiers of programming that it references in the Waiver Request. Moreover, Comcast has not provided sufficient assurance that such customers are not first required to buy-through any tier other than the basic tier before subscribing to those specialty tiers. Should Comcast choose to seek such a waiver, we note that it should describe in detail those procedures.

IV. CONCLUSION

34. For the reasons stated herein, we conclude that Comcast's Waiver Request, as submitted, does not justify a waiver under either Section 629(c), the standard set forth in the *2005 Deferral Order*, or Sections 1.3 or 76.7 of the Commission's rules. Accordingly, we deny the Waiver Request. However, we grant Comcast leave to file an amended waiver request that seeks waiver for a truly low-cost, limited capability set-top box, seeks a limited waiver for family and ethnic tier customers only, or seeks waiver based on a commitment to go all-digital by a date certain such as February 2009 or sooner, when broadcasters will cease their analog operations. In addition, we note, that should Comcast deploy a downloadable conditional access security solution that is available today, such as that developed by

¹¹⁰ Waiver Request at i. We only mention family and ethnic tiers here because they are specifically discussed in Comcast's Waiver Request. The fact that we address these specific tiers does not mean that we view such tiers as being preferable to other tiers Comcast may wish to offer in the future.

¹¹¹ *Further Report on the Packaging and Sale of Video Programming Services to the Public*, MB Docket No. 04-207, at ¶¶ 94-96, 101, Appendix B, Example 3 (rel. Feb. 9, 2006).

¹¹² As Comcast notes, the Family Tier that it announced in December 2005 is not yet available in most, if not all, of the areas it serves. See Waiver Request at 11 (stating that the Family Tier "will soon be available across most of Comcast's 'footprint'"). In addition, it appears that – at least in comparison to the Spanish-language offerings of some of its competitors – Comcast's Spanish-language tier has not been as successful as it would have liked. See George Winslow, *Ops Talk Over Their Hispanic-Market Tactics*, MULTICHANNEL NEWS, 12, Dec. 13, 2004 (reporting that Comcast executives have "acknowledged facing major challenges from popular Hispanic tiers on satellite TV"); see also George Winslow, *Operators Are Using A Variety Of Strategies To Lure A Wider Base Of Latino Subscribers*, MULTICHANNEL NEWS, A Special Advertising Supplement to Multichannel News and Broadcasting & Cable, 8A, Dec. 6, 2004 ("Over the last 18 months, the popularity of the Dish Latino package in the Hispanic community helped convince at least four major MSOs – Comcast Corp., Cox Communications Inc., Charter Communications Inc., and Insight Communications Co. – to radically revamp their Hispanic packages.").

Beyond Broadband Technology, no waiver of the ban would be necessary.

V. ORDERING CLAUSES

35. Accordingly, **IT IS ORDERED** that, pursuant to Section 629(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(c), and Sections 1.3, 76.7, and 76.1207 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, and 76.1207, the request for waiver filed by Comcast Corporation of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

36. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.¹¹³

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

¹¹³ 47 C.F.R. § 0.283.